NKM PROPERTIES SDN. BHD.

v.

RAKYAT FIRST MERCHANT BANKERS BERHAD

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
HASHIM YEOP SANI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 163 OF 1983]
18 JANUARY 1984

LAND LAW: *Charges - Order of sale - Whether proper - Loan not disbursed in accordance with terms of charge - Whether loan secured by charge - National Land Code, ss. 242, 340.*

The respondent bank obtained an order of sale by public auction of a piece of land in Seremban. The land was owned by the appellants and charged to the respondent bank. The charge was registered on 9 July 1980. The contention of the appellants was that the order of sale was wrong because the loan of RM1.8 million made to them was not secured by the charge as the disbursement of the loan was not according to the annexure to the charge. To be so covered, the disbursement should have been made after the registration of the charge, whereas it had been made before the execution of the charge.

Held:

[1] The grounds of appeal were unconscionable and misconceived.

[2] The charge was properly executed in accordance with s. 242, National Land Code. Section 340 of the National Land Code confers indefeasibility of title to the registered chargee, subject to subsection (2) of that section.

[3] In the circumstances of the case, the terms of the annexure did not prevent the respondent bank from making disbursement prior to the execution of the charge. The annexure merely imposed a duty on the respondent bank to make the disbursement of the loan after the execution and registration of the charge. In addition, the loan was disbursed pursuant to the appellants' application and the appellants could not be heard to say that the disbursement was not in accordance with the charge.

[4] Further, the charge expressly stated that it was executed to secure the repayment of the loan of RM1.8 million, which sum was acknowledged in the charge itself as having been received by the appellants.

[Appeal dismissed.]

Case referred to:
Tai Lee Finance Co. Sdn Bhd v. Official Assignee & Ors. [1983] 1 MLJ 81; [1983] CLJ (Rep) 387

Legislation referred to:
National Land Code Act 56/1965, ss. 242, 340, (2)

For the appellants - P.S. Ranjan; M/s. Ng Ek Tiong & Partners
For the respondents - Sasesedaran Achan; M/s. Nik Hussain, Ibrahim & Abdullah

JUDGEMENT

Hashim Yeop Sani FJ:

By originating summons dated 12 January 1982 the plaintiff bank then (respondents now) obtained an order of sale by public auction of the land held under C.T. 1478 Lot Nos. 499 and 656 Mukim of Seremban charged to the bank under Negeri Sembilan Register of Charge, Presentation No. 4659-80 Vol. 318 Folio 84. The background facts of the case which are not in dispute are set out in the affidavit supporting the originating summons. A memorandum of charge over the said land was executed on 30 June 1980 as security for the sum of RM1.8 million with interests thereon. The said charge was the first charge over the land and was duly registered on 9 July 1980. By the same charge the appellants were required to pay on demand all the sums which on their loan account was due and owing in accordance with the terms of the charge. The appellants received the letter of demand on or about 6 November 1981 but had failed or neglected to pay the said sum. The appeal is against the order of sale.

The main grounds of appeal rested on the annexure to the charge which appears at pp. 16-37 of the appeal record. This instrument was also executed on 30 June 1980 between the appellants and the respondent bank. The appellants would appear to rely heavily on Section 3.04 of the annexure relating to disbursement of the loan and Section 5.01 and Section 5.02 of the annexure relating to conditions precedent for disbursement. It was contended by the appellants that to be covered by the charge the disbursement of the loan must on the language of Section 3.04 be made **after** the execution and presentation for registration of the charge and upon observance and performance of Section 5.01 and 5.02 of the annexure and not before. It is not disputed that the disbursement of the loan of RM1.8 million had been made before the execution of the charge. The letter dated 25 March 1980 ("BCWJ 1") from the appellants to the respondent bank read as follows:

> We are pleased to advise that we would like to drawdown on the full amount of the Term Loan of RM1.8 million by 12.00 noon Thursday, 27 March. 1980.
>
> Kindly make the necessary arrangement to release the money to Messrs Nik Hussain, Ibrahim & Abdullah, Advocates & Solicitors, for their onward transmission to our Vendor's solicitor, M\s.Thavamani & Partners.
>
> Your co-operation on this matter is greatly appreciated.

The letter dated 28 March 1980 ("BCWJ 3") from the appellants also confirmed the instruction to release the amount of the loan to the solicitors concerned with undertaking to pay interest with effect from 27 March 1980. The letter also stated that the chargee's immediate attention would be greatly appreciated. The trial Judge found that from the terms of the letters the loan was urgently required by the chargor and was also satisfied that the amount of the loan was paid prior to and in anticipation of the execution of the charge. The disbursement made was to enable the appellants to purchase the same land which became the subject of the charge.

The directors of the appellants' company had also resolved that the directors be authorised to borrow the said sum of RM1.8 million on terms and conditions set out in the respondent bank's letter of offer dated 25 February 1980 ("BCWJ 4"). It was the term of the said letter of offer that the appellants were to provide the first charge of the said land as security for the loan.

On the other hand what the appellants were trying to persuade this Court to hold was that the order of sale made by the trial Judge was wrong because the loan was not disbursed in accordance with the terms of the annexure to the charge and therefore the loan was not secured by the charge.

In our view the grounds of appeal are unconscionable and misconceived. The land C.T. 1478 Lot Nos. 499 and 656 was properly charged under the National Land Code. The charge itself (pp. 12, 13 and 14 of the appeal record) was executed in accordance with s. 242 of the National Land Code by an instrument in Form 16A. The charge expressly states that it was executed to secure the repayment to the chargee of the loan of RM1.8 million which sum was also acknowledged in the charge itself to have been received by the appellants.

Section 340 of the National Land Code confers indefeasible title to the person or body in whose name any charge is for the time being registered and such title shall be defeasible only as provided under sub-section (2) of that section. See also *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 CLJ (Rep) 387.

It would seem to us that the appellants chose to rely not on the charge but on the annexure to the charge which, it is true, provides as to the manner and conditions for the disbursement of the loan. In our view however Section 3.04 of the annexure merely imposes a duty on the bank to make the disbursement of the loan after the execution and presentation of the charge. But this does not prevent the respondent bank from making disbursement before the execution of the charge as done in this case with the understanding the money was urgently required for the purpose of purchasing the same land. It is to be noted also that the rate of interest payable was the same. The conditions precedent for disbursement under Article V of the annexure to the charge would be relevant only where disbursement of the loan had not been made prior to the execution of the charge.

In this case the charge instrument clearly shows that disbursement of the sum of RM1.8 million had in fact been made since the appellants acknowledged the receipt of the same said sum in the charge. It is against all conscience and logic to allow the appellants to say that no disbursement of the loan of RM1.8 million has been made by the respondent bank under the charge and yet in the charging instrument itself the appellants acknowledged receipt of that sum. As the loan was disbursed pursuant to the appellants' application they cannot be heard to say that the disbursement was not in accordance with the charge.

It is our view that the arguments of the appellants are completely without merits. Appeal dismissed with costs.

Also found at [1984] 1 CLJ 231